



Legal update

No. 16 of 2018 • November 2018

momentum

Section 7B(1)(b) Exemption

On 9 October 2018 the Financial Sector Conduct Authority (the FSCA) published Guidance Note No. 4 of 2018 (the Note). Members of a fund have the right to elect trustees in terms of section 7B(1)(b) of the Pension Funds Act (the Act). The Note clarifies the FSCA's position on applications for exemptions and provides details of the conditions that they may impose. This legal update only deals with the most relevant aspects of the Note.

A. Background

Section 7A(1) of the Act provides that the members of a retirement fund have the right to elect 50% of the trustees (members of the board). Section 7B(1)(b) provides that umbrella, retirement annuity, beneficiary and preservation funds may be exempted from this requirement. The exemption, once granted, was for three years. The Note provides that the exemption may be granted for an indefinite period subject to certain requirements being met and depending on certain circumstances. Funds that currently have exemption must apply for an exemption for an indefinite period before the expiry date of the existing exemption.

B. Application for exemption

1. The FSCA will consider an application for exemption if:

- At least 50% of the trustees are independent.
- A trustee must meet certain criteria to be considered to be independent. The criteria include that the independent trustee -
 - has not in the previous ten years been expelled from any professional body of which he was a member or which was entitled to exercise disciplinary powers over him;
 - should not have been employed by or derived any income from the sponsor in the last five years; and
 - has not been convicted of an offence involving dishonesty, theft, fraud, forgery, uttering a forged document, misrepresentation, or breach of fiduciary duty.
- The fund rules must set out the process to be followed when the independent trustee no longer meets those criteria. The independent trustee's appointment must be terminated if he no longer meets the criteria.
- Where the fund has subcommittees, the chairperson of the subcommittees must be an independent trustee.
- A decision of the trustees will only be binding if 50% of the trustees present at the meeting are independent and 50% of them at that meeting support the decision.

Disclaimer:
Copyright reserved © MMI 2018

Conditions for use: The contents of this document may not be changed in any way. The document is for illustrative purposes only and does not constitute tax, legal, accounting or financial advice. The user relies on the contents at his sole discretion. A person should not act in terms of the information in this document without discussing it with an authorised financial adviser and should seek personal, legal and tax advice. MMI Holdings Limited, its subsidiaries, including MMI Group Limited, shall not be liable for any loss, damage (whether direct or consequential) or expenses of any nature which may be suffered as a result of or which may be attributable, directly or indirectly, to the use or reliance upon this publication.

MMI Group Limited (registration number: 1904/002186/06) is an authorised financial services and credit provider.
MMI Group Limited is a wholly owned subsidiary of MMI Holdings Limited.

- Round robin decisions must be tabled at the next board meeting for noting.
 - The board must adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of the material stakeholders in the best interests of the fund over time. This must be combined with a timeous, regular and relevant communication strategy for the fund and its members.
2. After a fund has been granted exemption, it must within 30 days of the appointment of an independent trustee, notify the FSCA of that appointment and provide them with a list of other information relating to that trustee. Once the FSCA has noted it, the fund can appoint that independent trustee to other funds or extend his appointment, and must then just notify the FSCA, without having to provide all the additional information again.
 3. If the FSCA is of the opinion that the independent trustee does not meet the fit and proper requirements, the fund must terminate his appointment.
 4. Funds have 180 days from the date of an exemption being granted, to change their rules to comply with the conditions set out in the Note.

Dionne Nagan

Legal Specialist: Research

Retirement Fund & Product Governance

Momentum Investments: Product Solutions